

**United States House of Representatives
Committee on Transportation and Infrastructure**

**Subcommittee on Railroads, Pipelines, and Hazardous Materials
Railroad-Owned Solid Waste Transload Facilities
October 11, 2007**

**Testimony of
Freeholder Barbara McMorrow
Monmouth County, New Jersey**

Thank you for the opportunity to speak on behalf of the residents of Monmouth County, NJ. I am Barbara McMorrow, an elected Freeholder.

This spring, Ashland Railroad Company in Monmouth County, applied to the Surface Transportation Board for an exemption to operate a solid waste transfer station on previously abandoned railroad tracks adjacent to a stream, and just a stone's throw from farms and homes. That stream, which parallels the train tracks, is a tributary of the Manasquan River, part of the watershed that comprises the drinking water for thousands of people. I was shocked to learn that a loophole in the law exists to allow railroad companies to operate solid waste transfer stations without any regulation by state or local governments.

I joined Congressman Pallone, DEP Commissioner Lisa Jackson and State Senator Ellen Karcher in April to protest the application to operate this unregulated solid waste transfer station, and offered my support as a county elected official in this fight to protect our residents and our environment.

Subsequently, Congressman Pallone and Senator Lautenberg shared with me information about their bill, the Clean Railroads Act of 2007. This bill would close the loophole in the federal law and would allow states to regulate solid waste stations regardless of proximity to rail lines. This bill must be passed, not only to protect the citizens of Monmouth County, New Jersey, but also the citizens of every county in every state in our country.

I have closely followed the application filed by Ashland Railroad Company, learning as much as I could from our County Solid Waste expert, Larry Zaayenga and a local citizen advocacy group, Sludge Busters. We were together at a meeting in August when we learned that the Surface Transportation Board had dismissed the application of the Ashland Railroad Company to operate a solid waste transfer station in Freehold Township. This temporary respite does not mean that our fight is over because the Surface Transportation Board rejected "without prejudice" the application of Ashland Railroad. That means that Ashland Railroad can re-apply, using the lessons learned from their rejected application, gain an exemption, and operate an unregulated solid waste transfer station.

Unlike our state law that requires the Counties to include any solid waste facility in its County Solid Waste Plan before any application is accepted by the New Jersey DEP, there is nothing in the law that would require the Surface Transportation Board to even notify the township or the County if Ashland Railroad resubmits an application. That means if any of us who are advocates for the people and environment in Monmouth County blink, the opportunity to oppose this plan is missed.

It appears that the Surface Transportation Board does not have the interests of our residents foremost. I say this because, in June, the Surface Transportation Board issued a decision that refused to close the loophole that allows unregulated solid waste transfer

stations. In July, the Surface Transportation Board ruled that railroads that load, unload, handle and store solid waste do not have to be regulated by state or local agencies. I believe that all solid waste must be regulated at the state and local level, regardless of its proximity to railroad tracks.

New Jersey has suffered greatly from this loophole. We have had solid waste piles next to railroad tracks that have polluted the air, ground and water. These unregulated piles have grown so high that they have caused power blackouts! They emit arsenic and mercury, two dangerous chemicals that are otherwise strictly regulated under the law. These stations operate in open air, with no buildings, so the chemicals and particulates are airborne, wreaking more havoc on residents and the environment.

Furthermore, property values surrounding an unregulated solid waste transfer station plummet. The hundreds of trucks that will travel to and from these unregulated waste stations will cause additional pollution, hazards to citizenry and damage to roads. All of these issues are addressed and mitigated when solid waste transfer stations are under the jurisdiction of the local and state governments.

New Jersey law requires all solid waste transfer stations to be in closed buildings. If hazardous waste is detected, the buildings have to utilize negative air flow to protect the environment and citizens. Additionally, New Jersey law only allows solid waste to be at a transfer station for a maximum of 24 hours. Unregulated solid waste transfer stations, ones that are granted an exemption under the loophole in the law, can leave solid waste as long as they chose, allowing significant damage to the environment.

This is multi faceted issue. What is at stake is not only quality of life, but fundamental health and safety issues. As a Monmouth County Freeholder, I am entrusted to preserve the integrity of the environment for our future generations.

Under the Interstate Commerce Commission Termination Act of 1995, the Surface Transportation Board has exclusive jurisdiction over "transportation by rail carriers" and the ability to grant federal preemption over other laws at any level—local, state or federal—that might impede such transportation. Congress intended such authority to extend only to transportation by rail, not the operation of facilities that are merely sited next to rail operations or have a business connection to a rail company. We can not allow hazardous waste to be unregulated due to a loophole in federal law.

How many members of this subcommittee would want to wake up one morning and find that they are living near an unregulated solid waste transfer station? That could happen because of the loophole in the law. This is why I am before you today to urge the passage of the Clean Railroads Act of 2007.

Written Testimony of Brian X. Foley, Supervisor of the Town of Brookhaven, New York

Before the Subcommittee on Railroad, Pipelines, and Hazardous Materials Committee on Transportation and Infrastructure United States House of Representatives

October 11, 2007

Chairwoman Brown, Ranking Member Shuster, honorable members of the Committee, my name is Brian Foley and I am the elected Supervisor of the Town of Brookhaven, New York. Brookhaven is a town with approximately 480,000 people located in central Long Island. In my capacity as Supervisor I am on the front lines of land use regulation and enforcement. Land use, zoning and environmental controls are critical tools in preserving the local environment and quality of life of the taxpayers of my town.

I appreciate the committee allowing me to speak on the important topic of railroad preemption and its effect on local municipalities. As I will describe shortly, the current loophole in law has allowed a land owner in our town to wreak environmental havoc under the alleged shield of railroad preemption. I have been advised that in many other localities local land use and environmental controls are being compromised by unscrupulous operators who illegitimately use the shroud of railroad preemption to open and operate waste transfer facilities.

The purpose of my testimony is to speak in favor of the legislation that has been proposed to close the loophole that has been used to try and avoid state and local controls for siting of waste facilities at rail yards.

I will supply the committee with local newspaper accounts that describe in detail what has come to pass in the Town of Brookhaven but as the saying goes, "a picture is worth a thousand words." I have with me enlarged aerial photographs of the 28-acre site in the Town of Brookhaven. As you can see from this photo, in July, 2007, prior to the owner of the property invoking the shield of railroad preemption, this was a pristine 28-acre parcel of land. Now 18 acres of this site have been clear-cut and newspaper accounts indicate that over 1,000 cubic yards of sand were mined without any environmental review under the National Environmental Policy Act or New York's State Environmental Quality Review Act.

That is correct, no level of government, federal, state or local have given any environmental approval for this work.

The owners of this property undertook this large-scale construction project, clear-cutting 18 acres of trees and mining thousands of cubic yards of sand based on their representations to the state and local government that they qualified for federal preemption because they were a railroad facility. They represented that they were exempt from local regulations and subject to the exclusive jurisdiction of the federal Surface Transportation Bureau ("STB"). Because of the uncertainty that currently exists in this area of the law, those representations were initially deemed to be credible. Yet, it was recently learned that they had never submitted their actions to the jurisdiction of the STB. Further a September 25, 2007 decision of the STB warned the owner not to commence rail construction activities at the site without STB approval. As a result of my Town's inquiry and the articles in Newsday, on October 4, 2007 the STB issued a letter to the rail carrier now involved directing them to stop all activities at the site and explain their conduct to the STB. More recently, we have received correspondence from representatives of the owner that leads us to believe that they intend to use this property as a solid waste transfer facility.

Since I anticipate that Brookhaven may be engaged in some sort of litigation or adversarial proceeding with the owners and operators of this property, I want to emphasize our position that these individuals have not followed the appropriate procedures to qualify for federal preemption and for that the owners and operators of this property will be held responsible for their crimes against the environment.

However, the current climate of uncertainty that exists in this area has emboldened unscrupulous operators in this area and led to the situation that the Town of Brookhaven now confronts. This uncertainty about the scope of federal preemption has allowed alleged railroad operators to claim that federal statute preempts all state and local laws that might apply to the construction of rail facilities, no matter how attenuated they are from actual railroad operations.

On Long Island, the railroad has traditionally meant our commuter railroad, the Long Island Railroad that brings Brookhaven residents into New York City for employment. We never envisioned that a company that adjoins a railroad and constructs a few hundred feet of railroad track could morph itself into a waste disposal facility that was free from all federal, state and local environmental review and permitting requirements.

Before I describe the role of these levels of government, we should be clear about what is at stake here and the significance of waste processing facilities. These facilities process garbage: usually either municipal solid waste or construction and demolition debris. These materials contain contaminants that can be harmful to the environment. For that reason, state and local governments have adopted comprehensive regulations that govern the way waste can be processed and often impose ongoing monitoring requirements to ensure that the waste disposal process does not cause harm to our environment.

Solid waste has traditionally been in the domain of state and local government. While Congress has adopted a legal framework for regulating solid waste, the federal government has never assumed a large role in this area and as a result there a very few

federal regulations that deal with solid waste transfer stations. Regulation in this area has been left to state and local governments, which have ably filled this regulatory gap.

For example, in the Town of Brookhaven, we have regulations that govern, among other things, the zoning and site plans for waste transfer facilities and attempt to ensure that they are sited in appropriate places and adequate mitigation measures are taken. Our role is complemented by the role of New York State and its so-called 360 regulations that review the environmental impacts of the operations of a transfer station.

In the case of waste facilities that invoke railroad preemption, they claim to be governed by the STB, a federal agency that does not have any type of permit application or site selection process. Additionally, the STB does not have the ability to conduct meaningful environmental or health impact review or to ensure compliance with engineering or design standards. As I understand it, the STB's staff is limited to no more than 150 employees by appropriation and only a small number of those employees are responsible for conducting environmental reviews.

What has resulted is a regulatory gap that I don't believe was ever really intended. A gap that creates a situation where no level of government is policing the activities of facilities that by their very nature pose significant risks to our environment. Given the risks to the environment posed by this regulatory gap, immediate and decisive action is needed by Congress.

CONCLUSION

Given the scarce resources of the federal government in this area and the limited reach of federal laws involving waste transfer facilities, there must be a role for state and local government in the area of regulating waste transfer facilities.

The mere fact that owners and operators in these situations claim to be rail related facilities, or in some cases allegedly operate as short line railroads, should not establish that they are rail carriers or that they are integrally related to rail operations so as to invoke federal preemption. In almost all of the cases I have seen or heard of, including the situation that has evolved in my town, the rail activity is merely secondary or incidental to the primary business, which is the processing and storage of solid waste.

For that reason, I would respectfully urge you to adopt an amendment to the Interstate Commerce Commission Termination Act to provide that rail facilities that process solid waste are not entitled to federal preemption.

